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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1958

No. 175

TALMADGE RALEY, JOSEPH STERN, EMMETT CALVIN BROWN,

*Appellants,*

v.

STATE OF OHIO,

*Appellee.*

APPEAL FROM THE SUPREME COURT OF OHIO

## REPLY BRIEF FOR APPELLANTS

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# INDEX

PAGE

**A DIRECTION TO ANSWER IS AN ESSENTIAL ELEMENT UNDER OHIO LAW OF THE OFFENSES FOR WHICH THESE APPELLANTS WERE CONVICTED** ..... 1

Conclusion ..... 6

## Cases Cited

Brown v. United States, U. S. (79 Supreme Court 539) ..... 4

Burnside v. Dewstoe, 90 O. Dec. Rep. 589 ..... 3

Hedebrand v. State, 129 O. S. 574 ..... 3

Lanzetta v. New Jersey, 306 U. S. 451 ..... 5

Quinn v. United States, 349 U. S. 155 ..... 3

State of Ohio v. Morgan, 164 O. S. 529 ..... 4

Wilson v. United States, 149 U. S. 60 ..... 5

## Constitutional Provisions and Statutes

Fourteenth Amendment to the United States Constitution ..... 4, 5, 6

Ohio Revised Code Section 103.35 ..... 2

Ohio Revised Code Section 2705.02 ..... 2

Ohio Revised Code Section 2917.42 ..... 4

## Miscellaneous

11 Ohio Jur. 2d Section 32 pp. 117-118 ..... 3

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### A DIRECTION TO ANSWER IS AN ESSENTIAL ELEMENT UNDER OHIO LAW OF THE OFFENSES FOR WHICH THESE APPELLANTS WERE CONVICTED

Appellee in its Brief (pp. 25-26) has asserted that neither Ohio R. C. Section 103.35 nor Ohio R. C. Section 2705.02 requires that a witness be ordered to answer to be subjected to the charge of contempt; that the Ohio Legislature did not choose to require a direction to answer as an element of the offense. This assertion is not supported by any citation of authortiy. Nor could it be since the Ohio Legislature

clearly chose to make a direction to answer a requisite element of the offense of contempt of the un-American Activities Commission of Ohio (hereinafter called Commission). The mandate to the Commission provided (R. C. Section 103.35):

> "In case of . . . the refusal of any person . . . to testify to any matters regarding which he may be lawfully interrogated, or to conform to section 2705.02 of the Revised Code, the chairman may be authorized by a majority of the members sitting at the time the alleged offense is committed, to cause a proceeding in contempt to be filed and prosecuted in the court of common pleas of any county under sections 2705.02 to 2705.09, inclusive, of the Revised Code."

Thus the Legislature deliberately chose to subject witnesses before the Commission to the provisions of R. C. Section 2705.02 which is the section covering "ACTS IN CONTEMPT OF COURT" (Appellants' Brief, p. 8), rather than the existing provisions of the Ohio Code covering contempts of the Legislature. Witnesses before the Commission were therefore put squarely on notice that the required elements of a judicial contempt were the required elements constituting a contempt of the Commission. The Supreme Court of Ohio affirmed this conclusion in its opinion in this case in rejecting appellants' attack on the validity of using the judicial contempt section for contempts of the Commission (R. 230):

> "Furthermore, it is clearly not a delegation of judicial power to the un-American Activities Commission but constitutes merely *a definition as to what shall constitute contempt* and a method of procedure by which proceedings may be instituted by the Commission in a judicial tribunal for the punishment of the contempt." (Emphasis supplied.)

And the appellants were indicted solely under the provisions of the judicial contempt section.

If this judicial contempt section had been interpreted at the time these appellants testified before the Commission to require a direction to answer before the offense had been committed, then these appellants could *not* be convicted of contempt unless a direction to answer had been given. And it is clear from the Ohio decisions that this judicial contempt section was so interpreted. *Burnside* v. *Dewstoe*, 90 O. Dec. Rep. 589; see *Hedebrand* v. *State*, 129 O. S. 574. This Court has noted that a direction to answer as a prerequisite to prosecution for contempt has been traditionally and uniformly recognized by both state and federal courts. *Quinn* v. *United States*, 349 U. S. 155, 167-158. The Court of Appeals for the First District of Ohio in its opinion in this case held that a direction to answer was a prerequisite to conviction (R. 184-187). The Ohio rule is stated categorically in 11 Ohio Jurisprudence 2d Section 32, pp. 117-118, covering judicial contempts under R. C. Section 2705.02:

> "But the refusal of a witness to answer questions cannot be unlawful unless the circumstances are such that he is properly required to testify, and unless it appears in some way upon the record that the refusal of a witness to answer was contumacious, he is not in contempt and cannot lawfully be imprisoned for such refusal. Thus, *there must have been a lawful order made to answer the question put to him, and a refusal to obey the order. A mere failure to answer the attorney's question does not constitute a contempt when there has been no order or command by the court that the question be answered.*" (Emphasis supplied.)

Certainly if at the time of the commission of an alleged criminal offense the laws and decisions of the State of Ohio defining that offense require proof beyond a reason-

able doubt of certain essential elements, due process is violated if the state retroactively determines that one of those elements need not be proved and that the alleged offense, absent that required element, constitutes a crime for which the offender could be fined and imprisoned. This Court would without hesitation reverse a conviction for judicial contempt in the State of Ohio if there had been no direction nor order to the witness by the court to answer the question. When a legislative contempt is, in the words of the Ohio Supreme Court, defined by the judicial contempt section, the same result must follow.

It should be noted that the Supreme Court of Ohio in *State of Ohio* v. *Morgan*, 164 O. S. 529, a companion case decided in the same opinion as this case and now on appeal in this Court (No. 463, Oct. Term, 1958), concluded after careful analysis that a direction to answer was not necessary (R. 216-222). *But the appellant in that case was indicted under the legislative contempt section (Ohio R. C. Section 2917.42) and not, as the appellants in this case were, under the judicial contempt section.* The Supreme Court of Ohio furthermore did not specifically reach the question of the requirement of a direction to answer in its opinion in this case. Had it done so, it would have under the existing cases held that such direction was a prerequisite or it would have had to retroactively redefine the offense to the end that these appellants would have been denied due process under the Fourteenth Amendment. Recently this Court has, in both the majority and dissenting opinions, reaffirmed that required procedures in contempt cases be scrupulously observed. *Brown* v. *United States*, __ U. S. __ (79 Supreme Court 539).

The requirement of a direction to answer is even more compelling under the circumstances of this case. The Commission had instructed the appellants that their privilege

against self-incrimination was available and the appellants asserted their privilege to every question for which they were convicted. In all but one instance this assertion was apparently accepted and certainly not specifically overruled by the Commission (Appellants' Brief, p. 29). These appellants now stand convicted since the Supreme Court of Ohio in effect reversed the Commission and held that the privilege was not available to the appellants and that their assertions of it without being countermanded were acts of contempt.

The injury inflicted on these appellants thus becomes doubly glaring. In order to maintain their liberty and property it was incumbent on them under exceedingly difficult circumstances (see *Wilson* v. *United States*, 149 U. S. 60, 66): First, to conclude that a requisite element of the offense with which they had been charged—a direction to answer—would by judicial silence at a subsequent date be jettisoned; second, to conclude that their privilege which the Commission before whom they were testifying assured them was available and two judges of the Supreme Court of Ohio confirmed (R. 230-235; 238-241) would at a subsequent date be held not to be available. This Court has held that due process does not permit persons to be placed in such a position:

> "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids." *Lanzetta* v. *New Jersey*, 306 U. S. 451, 453.

Whether this Court rules that the Due Process Clause requires state officials, judicial, legislative or administrative, to order answers before a conviction for contempt can be sustained—a position urged by the appellants in their Brief—, it must certainly rule that if the state law requires

such direction, the Due Process Clause prohibits convictions in cases where no such direction was given.

## CONCLUSION

For the foregoing reasons and for the reasons set out in Appellants' Brief filed previously herein, it is submitted that appellants' convictions and sentences violated their constitutionally protected rights under the Due Process Clause and must accordingly be reversed.

Respectfully submitted,

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